SUPREME COURT, U. S.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1572

ROBERT L. STEPHENS,

Petitioner,

vs.

FLORIDA REAL ESTATE COMMISSION and CORNELIUS L. REAGAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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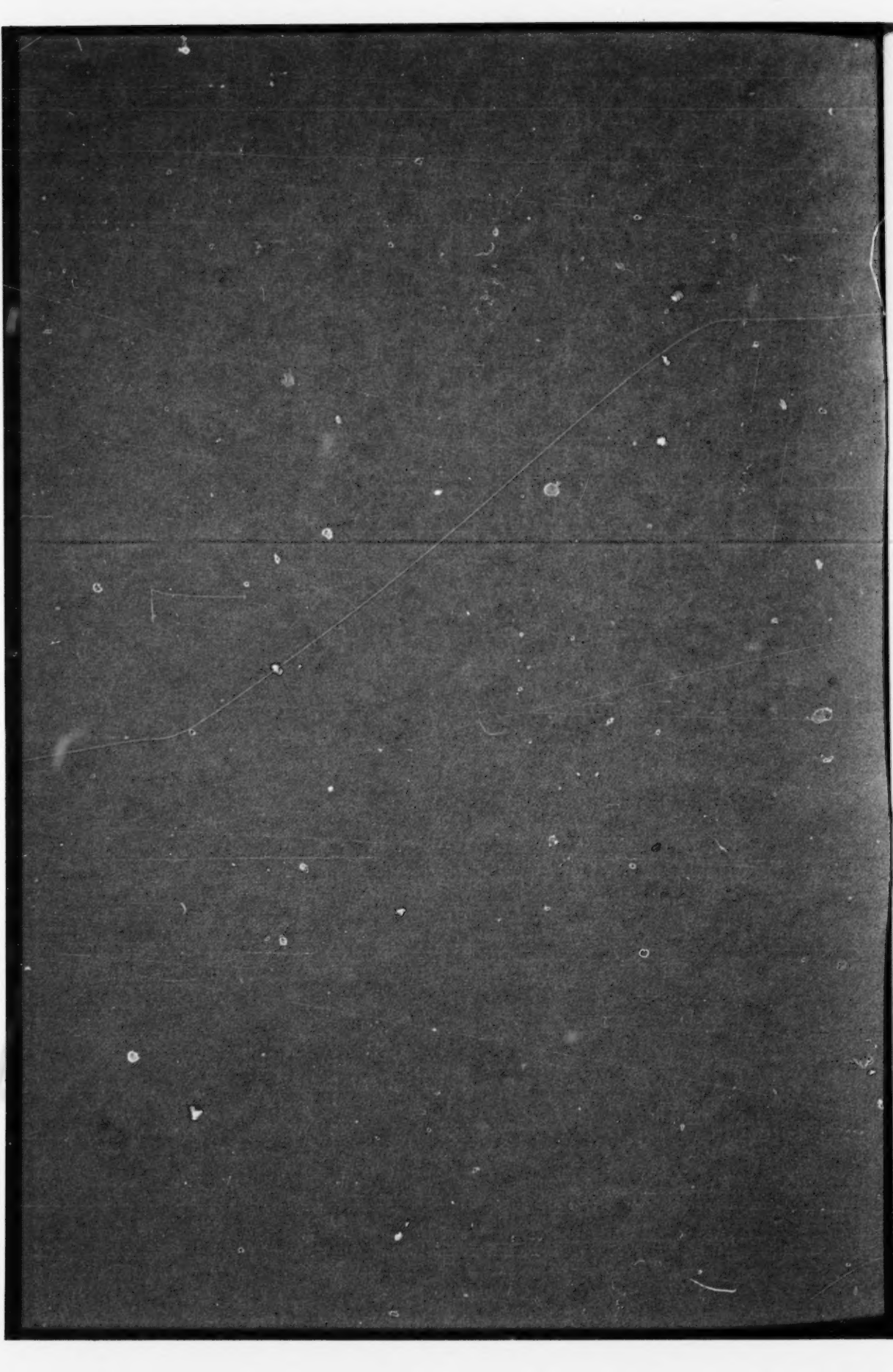

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Florida Supreme Court, entered in the above-entitled case on December 7, 1970, Petition for Rehearing having been denied on January 15, 1971.

OPINIONS BELOW

The Florida Supreme Court did not write an opinion. The District Court of Appeal of the State of Florida, Fourth District did not write an opinion.

JURISDICTION

The judgment of the Florida Supreme Court was entered on January 15, 1971. This Petition for a Writ of Certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED

The FLORIDA REAL ESTATE COMMISSION, by and through its authorized representative, CORNELIUS L. REAGAN, filed an Information against the Petitioner herein charging various violations of Chapter 475, Florida Statutes, Real Estate License Law. The questions thereby arising are:

1. Is a party to an administrative hearing entitled to the right of counsel during all stages of the proceedings?

2. Is a party to an administrative hearing denied due process of law where a subpoena is issued and directed to him and requiring him to appear and testify before the Respondent, CORNELIUS L. REAGAN?

3. Is the action of an administrative body in revoking the license of one of its members under the facts and circumstances herein present, "cruel and unusual punishment"?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution of the United States, Amendment VI:

> " . . . The accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . . "

Constitution of the United States, Amendment VIII:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Constitution of the State of Florida, Article I, Section 9:

> "No person shall be deprived of life, liberty or property without due process of law . . . or be compelled in any criminal matter to be a witness against himself."

Constitution of the State of Florida, Article I, Section 17:

> "Excessive fines, cruel or unusual punishment . . . are forbidden."

Chapter 475, Florida Statutes, Real Estate License Law:

STATEMENT OF FACTS

The Petitioner, ROBERT L. STEPHENS, a resident of Fort Lauderdale, Broward County, Florida, has been for approximately four years prior to the institution of these proceedings by the FLORIDA REAL ESTATE COMMISSION, registered with said FLORIDA REAL ESTATE COMMISSION as a broker and for approximately four years prior thereto was registered with the FLORIDA REAL ESTATE COMMISSION as a licensed real estate salesman.

During the month of March or April of 1968 the Petitioner and one Jane R. Shaw entered an exclusive sales listing agreement with regard to a certain parcel of real estate in Broward County, Florida, which was owned by the aforesaid Mrs. Shaw.

Thereafter one of the Petitioner's salesmen obtained a prospective purchaser for the property and a deposit receipt contract was entered into by the respective parties after some pricing modifications immaterial to this cause. A deposit was duly received by the Petitioner from the prospective purchaser, whereupon the Petitioner deposited the funds into an account entitled "R. L. Stephens, Agent", which was later shown to be the only account maintained by the Petitioner.

Sequentially, the prospective seller, Mrs. Shaw, contacted the Petitioner and advised him that there was a distinct possibility that she would not be in the area at the time scheduled for the closing of the transaction and requested the Petitioner to consummate the closing on her behalf. Mrs. Shaw executed a Deed to the property to be delivered at the closing by the Petitioner and instructed him to deliver the Deed to the Purchaser at the closing.

A delay occurred with regard to the closing due to certain title situations not material to this cause, and in due course a closing was held at which time the seller, Mrs. Shaw, was not in town.

At the closing the Petitioner executed the Closing Statement as Agent for Mrs. Shaw and received a check made payable to Mrs. Shaw; said check representing the net proceeds of the sale.

Thereafter the Petitioner, acting as Agent for Mrs. Shaw, presented the check to the Broward National Bank in Fort Lauderdale, Florida, and received therefor a Cashier's Check and, in turn, deposited a Cashier's Check to the account of "R. L. Stephens, Agent".

Shortly thereafter Petitioner left the Fort Lauderdale area and upon his return advised Mrs. Shaw that the closing had been consummated and that he would deposit the proceeds of the sale to her account. The Petitioner then made or caused to be made a personal check in the amount of the proceeds of the sale to Mrs. Shaw's account and upon presentation to the bank the check was not honored for reason of insufficient funds maintained in the account.

On September 13, 1968, the Petitioner made partial restitution in the amount of $8,000.00 to Mrs. Shaw and paid the remainder to Mrs. Shaw on or about September 20, 1968.

On October 10, 1968, the Respondent, CORNELIUS L. REAGAN, contacted and interviewed the Petitioner relative to the transaction, at which time the Petitioner was not represented by counsel, but was merely informed

that the Respondent, CORNELIUS L. REAGAN, was an Investigator of the FLORIDA REAL ESTATE COMMISSION. No warnings were given to the Petitioner in regard to his right to counsel.

On October 22, 1968, the Respondent, CORNELIUS L. REAGAN, again interviewed the Petitioner pursuant to a subpoena in the form of a Subpoena Duces Tecum issued by the FLORIDA REAL ESTATE COMMISSION.

The subpoena contained a penalty provision as follows:

> "A failure to respond to the above subpoena without lawful excuse, or to produce any document required, or to answer fully all lawful questions propounded at the hearing, violates Sec. 475.42 (1) (i), Florida Statutes, and is punishable by a fine of not less than $50.00 nor more than $500.00, or imprisonment for not more than 6 months; or, you may be cited before the circuit judge for contempt."

The Petitioner responded to the subpoena and produced his bank statements and cancelled checks as required by the subpoena.

Subsequently, on or about December 13, 1968, an Information was filed by the Respondent, CORNELIUS L. REAGAN, as an authorized representative of the Respondent, FLORIDA REAL ESTATE COMMISSION, against the Petitioner.

A hearing on the Information was held on May 13, 1969, before a Hearing Examiner for the FLORIDA REAL ESTATE COMMISSION, whereupon the Exam-

iner, after hearing the testimony and evidence presented, submitted a Recommended Order on August 20, 1969. The Recommended Order of the Examiner found the Petitioner guilty of violating certain charges set forth in the Information and not guilty of some of the charges so set forth.

The findings of the Examiner, if adopted by the FLORIDA REAL ESTATE COMMISSION, would have had the effect of reprimanding and/or suspending the Petitioner's real estate license, but not revoking the same.

Subsequently, the Petitioner and Respondents, by and through their respective attorneys of record, filed exceptions to the Hearing Examiner's Recommended Order and the FLORIDA REAL ESTATE COMMISSION, on October 24, 1969, entered its Final Order sustaining the Respondents' Exceptions to the Examiner's Recommended Order and denied the Petitioner's Exceptions to the Examiner's Recommended Order, the effect of which being the revocation of the Petitioner's Registration Certificate pursuant to Chapter 475, Florida Statutes.

The Petitioner then duly filed a Petition for a Writ of Certiorari to the FLORIDA REAL ESTATE COMMISSION which was brought before the District Court of Appeal of Florida, Fourth District. The District Court of Appeal of Florida, Fourth District, denied the Certiorari on April 8, 1970.

The Petitioner then filed a timely Appeal to the Florida Supreme Court; said Appeal having been dismissed by the Florida Supreme Court upon Motion of the Respondents, FLORIDA REAL ESTATE COMMISSION and CORNELIUS L. REAGAN, for failure of the Petitioner to perfect the appeal.

REASONS FOR GRANTING THE WRIT

The questions presented are of vital importance and should be decided by this Honorable Court not only because they involve United States constitutional provisions, but because they involve fundamental and basic rights of individuals with respect to administrative agencies.

> "It may be taken as established that there is no constitutional right to the assistance of counsel in administrative proceedings which are purely investigatory rather than adjudicative in nature . . . If there is a right to a hearing to which a person is entitled as a matter of procedural due process, that is, if there is involved an administrative adjudication respecting a constitutionally protected right, the test of fairness required of such a hearing may fail to be met where there is a denial of counsel, at least in the circumstances of the particular case." 2 Am Jur 2d, Administrative Law, Sec. 273.

While the Miranda decision (*Miranda vs. Arizona*, 384 U.S. 436, 86 S.Ct. 16(2), and the Sixth Amendment to the United States Constitution apply to criminal actions, it is submitted that the same rights, that is the right to counsel, have applicability to the case at bar.

The subpoena issued and directed to the Petitioner provided for criminal sanctions against the Petitioner for his failure to respond thereto. The interview by the Respondent, CORNELIUS L. REAGAN, of the Petitioner, ROBERT L. STEPHENS, on October 10, 1968, was investigative and accusatory in nature and it is set forth that the Petitioner had the constitutional right to have the Miranda warnings submitted to him.

With regard to the denial of due process of law and the violation against testimonial compulsion, it is again set forth that a subpoena in the form of a Subpoena Duces Tecum directed to a party in an administrative hearing has the effect, as in the case herein, of compelling a party to be a witness against himself.

The Petitioner submits with regard to the question of "Cruel and unusual punishment" that the initial Final Order of the FLORIDA REAL ESTATE COMMISSION in revoking the license of the Petitioner was a punishment grossly severe and harshly inappropriate under the facts and circumstances set forth and was in violation of the purposes and objectives for which the administrative proceedings were initiated.

The Florida and United States Constitutional prohibition against cruel and unusual punishment have been generally held to apply to criminal cases. However, it is set forth that the same prohibitions have applicability to the case at bar. In criminal cases it has generally been held that the constitutional prohibition against cruel and unusual punishment refers to the statute affixing the punishment and not the punishment set by the Court within the limits defined in such statute, and if the statute does not violate the Constitution, any punishment set in conformity to it cannot be adjudged excessive. See *Chavigny vs. State*, 112 So.2d 910 (D.C. of A., 2nd Dist., 1959).

However, it has also been held that where the sentence imposed is so greatly disproportionate to the offense committed and the circumstances involved so as to be arbitrary and unreasonable and shocking to man's sense of justice

and fair play, then the punishment imposed constituted a cruel and unusual punishment regardless of the statute involved. *Faulkner vs. State*, 445 P.2d 815 (1968, Alaska).

The standard set forth by the United States Supreme Court in *Weems vs. United States*, 217 U.S. 349, 30 Sup. Ct. 554 (1910) is that a sentence of imprisonment which was greatly disproportionate to the offense committed would be considered cruel and unusual in the constitutional sense.

In *Robinson vs. California*, 370 U.S. 660, 825 Sup. Ct. 1417 (1962) the United States Supreme Court held that the Eighth Amendment's ban on cruel and unusual punishment is obligatory on the States through the Fourteenth Amendment.

> "While stating that the state constitutional provisions forbidding cruel and unusual punishment has reference to the statute fixing the punishment and not to the punishment assessed by the jury within the limits fixed by the statute, the court in Cox vs. State (1943) 203 Ind 550, 181 NE 469, declared that there are nevertheless cases where defendants have been found guilty and imprisoned under valid statutes but where appellate courts have held such imprisonments to be in violation of the Constitution by reason of their length. The court pointed out that in such cases the imprisonments are so severe and so entirely out of proportion to the gravity of the offenses actually committed as to shock public sentiment and violate the judgment of a reasonable people."
>
> 33 ALR 3d 335, Cruel and Unusual Punishment, Sec. 6, P. 364.

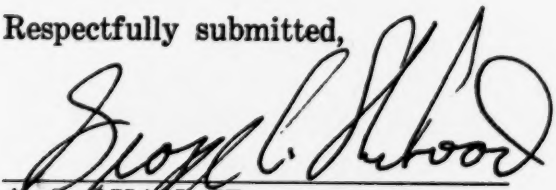
It is submitted that the same generic law that applies in a criminal proceeding would be equally applicable in a civil or administrative hearing.

In summation it is submitted that the action of the Commission in revoking the license of the Appellant was cruel and unusual punishment under the facts and circumstances sub judis and violative of prohibitions set forth in the Eighth Amendment of the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Florida.

CONCLUSION

For these reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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